United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2352

To be argued by
DONALD B. DA PARMA

United States Court of Appeals
FOR THE SECOND CIRCUIT

Index No. 74-2352

WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, LESLIE BOYARSKY, JACQUELINE GROSS, ARLENE FRIEDMAN, ROBERT SUSSMAN, ALICIA CANTELMI, PAMELA MILLS, SUSAN PASS, LINDA ZISES, EMILY BLITZ, SUSAN PADWEE, ELAINE JUSTIC, EULA CARTER, and LINDA SHAH, on behalf of themselves and others similarly situated,

Plaintiffs-Appellants,

-against-

THE CITY OF NEW YORK; ABRAHAM BEAME as Mayor of the City of New York; JOHN V. LINDSAY; HARRY BRONSTEIN, as City Personnel Director; NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; NEW YORK CITY HOUSING AUTHORITY; NEW YORK CITY OFF-TRACK BETTING CORPORATION; JOSEPH MONSERRAT, SEYMOUR P. LACHMAN, ISAIAH E. ROBINSON, JR., MARY E. MEADE, Constituting the Board of Education of the City of New York; BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK; GROUP HEALTH INCORPORATED; SOCIAL SERVICES EMPLOYEES UNION; SOCIAL SERVICES EMPLOYEES UNION WELFARE FUND; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES; DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN; UNITED FEDERATION OF TEACHERS; and UNITED FEDERATION OF TEACHERS WELFARE FUND,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK

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Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE BLUE CROSS & BLUE SHIELD OF GREATER NEW YORK

Nature of the Case

The complaint in this action (reprinted at 28a, et seq.)* charges defendants with discrimination against plaintiff employees of the City of New York (the "City") on the basis of sex because of the manner in which pregnancy and maternity were treated in certain employee benefit programs. Specifically, discrimination is alleged --

First, (in counts one through three) by operation of the health and hospitalization coverage provided by the City to all its employees;

Second, (in counts four through six) by operation of certain disability insurance programs; and

Third, (in counts seven through eleven) by operation of certain leave policies.

This brief is addressed only to the first of these three claims as defendant Blue Cross & Blue Shield of Greater New York ("Blue Cross") is named only as having "aided and abetted" the City in its alleged discrimination with regard to the health and hospitalization insurance policy.

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*Numbers in parentheses followed by the letter "a" are references to the Appendix filed by Plaintiffs-Appellants.

The Coverage Complained of

The maternity coverage to which complainants object is that provided under a basic hospitalization contract purchased by the City from Blue Cross (Complaint ¶¶ 52-54 at 28a-31a), and that which was provided under a contract between the City and United Medical Service, Inc. ("UMS")*, cancelled as of October 1, 1973. Complaint ¶¶ 55, 56 at 31a-32a. This coverage plaintiffs correctly state as being "negotiated ... and provided by defendant City" (Complaint ¶ 51 at 28a), which is to say the City selects the coverage to be provided and the City pays the premiums. Blue Cross offers to sell additional maternity coverage to subscriber groups, and some City employee health and welfare funds have purchased additional maternity coverage from Blue Cross for those employees whom they represent. Answer of Blue Cross ¶ 54 at 81a.

While there is no question that the coverage for normal maternity expenses purchased by the City for its employees and their dependents is less than that provided for most other

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*Subsequent to the filing of the Complaint herein, Associated Hospital Service of New York (the greater New York metropolitan area Blue Cross Plan) and United Medical Service, Inc. (the greater New York metropolitan area Blue Shield Plan) consolidated to form Blue Cross and Blue Shield of Greater New York, which was substituted as a defendant herein.

medical and surgical experiences,* there is also no question that the coverage provided applies equally to employees and dependents, and thus is the same for female employees as it is for the female dependents of male employees. Accordingly, every employee receives the same coverage for the expenses attendant to childbirth, whether it is the (female) employee who is pregnant, or the (female) dependent of the (male) employee who is pregnant.

Yet, in the face of this equality of treatment, Plaintiffs here -- who include both male and female employees of the

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*The basic contract purchased by the City from Blue Cross and Blue Shield affords coverage for maternity as follows: an allowance of $80.00 toward hospital charges for normal delivery or an elective abortion, either in the inpatient or outpatient department of an accredited hospital; and, for conditions arising out of and during pregnancy, an allowance of $10.00 per day for up to 8 days of care rendered prior to hospitalization during which pregnancy is terminated. However, for Caesarean Section, spontaneous termination of pregnancy during the first six months, for termination of an ectopic pregnancy and for certain other surgical terminations, regular Hospital Benefits are provided from the date of termination, less the days of care previously provided, if any.

The basic contract purchased by the City from UMS provided coverage for maternity as follows: an allowance of $150.00 for normal delivery and any surgery in connection with such delivery and for customary pre-natal and post-natal care, or an allowance of $138.00 for an elective abortion; larger allowances for various surgical expenses in connection with any condition arising out of and during pregnancy but not included as an expense for normal delivery; and inclusion under Major Medical coverage of expenses from ectopic pregnancy, miscarriage, Caesarean Section, and severe medical complications arising out of pregnancy and childbirth, to the extent that expenses exceed benefits payable under the basic coverage.

City -- assert that by this coverage they have all "been subjected to discrimination in the terms and conditions of their employment on the basis of sex." Complaint ¶ 54 at 31a. See also ¶ 56 at 32a. And Plaintiffs further aver that defendant Blue Cross has discriminated against them by having "aided and abetted the defendant City in its illegal discriminatory acts" solely on the basis that it has "negotiated and entered into health and hospital insurance contracts which discriminate in their provisions on the basis of sex." Complaint ¶ 61 at 34a.

The Proceedings Below

The complex sequence of events by which this matter is again before this Court are described at pages 5-10 of Plaintiffs-Appellants' brief. Rather than repeat that lengthy history, Blue Cross respectfully refers the Court to that statement.

Questions Presented

The issues now before this Court in terms relevant to Blue Cross are simply:

1. Does the allegation that the City's health and hospitalization coverage discriminates on the basis of sex state a cause of action under the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. ("Title VII") and, if pendent jurisdiction exists, under the New York State and New York City antidiscrimination statutes?

2. If this allegation does state a valid cause of action, can Blue Cross be held to have "aided and abetted" such discrimination?

I.

REGARDLESS OF THE MERITS OF PLAINTIFFS' CLAIMS OF DISCRIMINATION, NO CLAIM LIES AGAINST BLUE CROSS FOR "AIDING AND ABETTING."

Blue Cross -- the insurance company from which the City purchased the health insurance program here complained of -- is brought by Plaintiffs before the bar solely on grounds that by having "... negotiated and entered into ... insurance contracts ..." which Plaintiffs claim discriminate on the basis of sex, "Blue Cross "... aided and abetted the City in its [alleged] discriminatory acts...." Complaint ¶ 61 at 34a. Leaving aside the factual dimensions of this allegation, absent here is any basis, either in law or in any reasonable analysis of the surrounding circumstances, upon which Blue Cross can be deemed guilty of having discriminated against these Plaintiffs on the basis of sex. Thus, even if the underlying claims in counts one through three be deemed to state a cause of action, those claims as they relate to Blue Cross must be dismissed on

the law and pleadings.*

A. Title VII Is Inapplicable to Blue Cross Acting as an Insurer.

Initially, the claims charging Blue Cross -- present here only as an insurer -- with "aiding and abetting" violations of Title VII, must be dismissed, as a matter of law, for the strictures of Title VII apply singularly, and with specificity, only to employers, employment agencies, labor organizations, and joint labor-management committees, as the words of the statute make clear. This limited scope of the statute may not be expanded by Plaintiffs seeking to involve the Court's jurisdiction through vague theories of accessorial liability.

Title VII states that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of ... sex..." 42 U.S.C. § 2000-2(a) (emphasis added). Similarly, subparagraphs (b) and (c) proscribe discrimination by "employment agen[cies]" and "labor organization[s]." The targets of the legislation are

*Should all federal claims be dismissed, pendent state law claims will presumably likewise be dismissed, Kavit v. A. L. Stamm & Co., 491 F.2d 1176 (2d Cir. 1974), and accordingly, are not separately treated herein.

thus clear and specific, and nowhere does the act provide accessorial liability for "aiding and abetting." The very words of the statute thus make clear its limited applicability: unless a defendant comes within the definition of "employer", "employment agency" or "labor organization", jurisdiction under Title VII is simply lacking.*

Thus it was, that in the proceedings underlying this action, the EEOC -- the Agency charged with enforcement of Title VII -- concluded on May 30, 1974, that Title VII did not apply to Blue Cross in this instance. The charge involved was one of those upon which the instant suit is based: among the charging parties were Leslie Boyarsky and Barbara Robertson, Plaintiffs herein, and the same charges stated herein were presented to the EEOC, against some of the same Defendants, including Blue Cross. The EEOC, in a Determination Letter signed by the Acting District Director of New York, Freddie D. Holt, "on behalf of The Commission", dismissed the charges against the insurer Defendants, holding:

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*This limited scope of applicability comports with the legislative history of Title VII. Throughout the congressional proceedings, the narrow scope of the new law was made clear. House Report 914, which accompanies the report of the final bill by The Judiciary Committee, states that "Section 704(a) describes a number of activities which, if engaged in by employers, will constitute unlawful employment practices." U.S. Code Cong. & Admin. News, 1964, Vol. 2, at 2402 (emphasis added). In debate on the floor of the Senate, Senator Clar (D.-Pa.), one of the bill's managers, explained that the bill did not restrict freedom of employers "subject to one qualification, and that qualification is to state: 'In your activity as an employer . . . you must not discriminate. . . .'" 110 Cong. Rec. 13080 (emphasis added).

> Charging Parties Robertson and Boyarsky's sworn charges against the above noted Respondents are dismissed for lack of jurisdiction since, as insurance carriers, they are neither employers, labor organizations or employment agencies within the meaning of Title VII. Determination in Robertson v. Board of Education, Cases TNY 3-0776-7, 1174-5, 1539-41; TNY 4-0730; YNY [sic] 4-409, dated May 30, 1974, at 2n. (203a-206a)

Although no court has had occasion to rule on the specific issue of whether an insurer can be held liable for aiding and abetting a violation of Title VII, considered, and dismissed, has been an analogous attempt to extend Title VII liability beyond the limits established by the statute. In Brush v. San Francisco Newspaper Printing Co., 315 F.Supp. 577 (N.D.Cal. 1970), aff'd per curiam, 469 F.2d 89 (9th Cir. 1972), cert. denied, 410 U.S. 943 (1973), plaintiff attempted to hold defendant, publisher of The San Francisco Chronicle, liable under Title VII for sex discrimination on the grounds that defendant published "want ads" separated into "Male" and "Female" headings. This claim the court dismissed on the following analysis:

> The Civil Rights Act section now under scrutiny are not made broadly applicable to all "persons," but only to "employer," "employment agencies" and "labor unions." Since the statute is neither made specifically applicable to newspapers nor made so broadly applicable as to include newspapers, there was no reason for any express exclusion, qualified or otherwise, of newspapers. Indeed, in our opinion, the absence of any such exclusion is persuasive that Congress never contemplated a claim that newspapers were included. For, if it had so contemplated, it would in all probability have added at least a qualified exclusion....
>
> * * *

> Certainly, if the Congress intended to impose on newspapers, not only new responsibilities but also new personnel and procedural activities, it could have and in our opinion would have specified newspapers along with employers, labor unions and employment agencies. It not only did not do so, it clearly expressed its contrary intent in the legislative history leading to the passage of the legislation.
>
> If, as plaintiff argues, the legislation would be improved by inclusion of newspapers, such inclusion must be accomplished by the Congress -- not by the courts. 315 F.Supp. at 582, 583.

Thus, the claims against Blue Cross for "aiding and abetting" a violation of Title VII must be dismissed.

B. Under Any Plausible Set of Facts, Blue Cross Could Not Be Deemed to Meet the Standards Required for Liability to Attach as an Aider or Abettor.

Beyond the jurisdictional inability of Blue Cross' being found guilty of "aiding and abetting" a violation of Title VII, apparent at the outset is that Blue Cross cannot be deemed to meet the standards required for liability as an aider or abettor under any basis.

Liability for aiding and abetting the unlawful act of a principal defendant requires, under federal law, "that the act is known to be tortious." Ruder, "Multiple Defendants", 120 U. Pa. L. Rev. 597, 621 (1972). Thus, aiding and abetting has been defined as "knowing assistance of or participation in" (emphasis added) the principal defendant's fraudulent scheme,

Pettit v. American Stock Exchange, 217 F.Supp. 21, 28 (S.D.N.Y. 1963) and the leading case on this question, Brennan v. Midwestern United Life Insurance Co., 259 F.Supp. 673 (N.D. Ind. 1966), motion to dismiss denied, 286 F.Supp. 702 (N.D. Ind. 1968), aff'd, 417 F.2d 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970), relies principally on the Restatement of Torts, § 876 (1939), which provides:

> For harm resulting to a third person from the tortious conduct of another, a person is liable if he * * * (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.... (emphasis added).

In view of the novel nature of the challenge to the legality of the health insurance coverage herein, it is clear that Blue Cross could not have had any reason to believe that such coverage was illegal. On the contrary, such coverage appears to be specifically validated by the Regulations of the New York State Department of Insurance, which provide at § 52.16 of Title 11, of the Official Compilation of Codes, Rules and Regulations of the State of New York, that --

> Prohibited provisions and coverages
>
> ....
>
> (c) No policy shall limit or exclude coverage by type of illness, treatment or medical attention, except as follows:
>
> (3) Pregnancy, except for complications of pregnancy....

Further, as the coverage herein complained of applies equally to employees and their dependents, Blue Cross not only concluded that absent was any possibility of discrimination -- a position it still maintains -- but further that it comported with the EEOC Guideline, 29 C.F.R. 1604.9(d), which requires equal maternity coverage for female employees and female dependents of male employees. Thus, Plaintiffs cannot seriously maintain that it can be established that Blue Cross participated in providing coverage which it knew to contravene the legal proscriptions against discrimination on the basis of sex.

Additionally, required for liability as an aider and abettor is that the defendant "... must act or fail to act with the specific intent to facilitate..." (emphasis added) the illegal behavior of the principal defendant. United States v. Bryant, 461 F.2d 912, 920 (6th Cir. 1972). But upon what basis could Plaintiffs conceivably establish the inherently self-contradictory proposition that Blue Cross, a not-for-profit health insurance agency, should seek to limit the coverage purchased from it? Such allegations as must underpin liability as an aider and abettor simply will not wash.

II.

AS THE HEALTH AND HOSPITALIZATION POLICY UNDER ATTACK APPLIES EQUALLY TO MALES AND FEMALES, ABSENT HERE ARE ANY DISCRIMINATORY EFFECTS ON MEMBERS OF THE CLASS.

Beyond the inability of Plaintiffs-Appellants attaching any liability to Blue Cross for alleged discriminatory dimensions of the City's dealings with its employees, the overriding fact of the matter is that developments in the law have undermined the foundation of Plaintiffs-Appellants' case -- i.e., the contention that distinctions based on pregnancy inevitably discriminate on the basis of sex. That theory, upon which this complaint was drafted, has been conclusively refuted by the Supreme Court in Geduldig v. Aiello, 417 U.S. 484 (1974), and General Electric Co. v. Gilbert, U.S. , 97 S.Ct. 401 (1976). Plaintiffs-Appellants try to avoid the effect of these decisions by speculating that the health and hospitalization program complaint of might have a discriminatory effect on women. In so doing, they ask this Court to ignore the absence of dissimilar treatment of men and women. For, despite the fact that only women give birth to a child, parents -- male and female -- bear the medical cost of that event. And it is protection against that cost, borne by both male and female employees, and covered equally for male and female employees, which

is the purpose and effect of the policy complained of herein, since the same health and hospital coverage for maternity is provided to all female employees as well as to the female dependents of all male employees.*

While the health and hospitalization coverage provided for maternity is indisputably less than coverage provided for most other medical and surgical experiences,** this lesser coverage impacts with blind impartiality on males and females; on fathers as well as mothers. By the same token, were maternity benefits to be increased, the benefit of such change would accrue to males as well as females. Thus, while increased health and hospitalization coverage might be a fit subject for the labor negotiating table, the absence of any discriminatory effect as against either gender precludes its being characterized as sex discrimination.

On this very issue of treatment of dependents, the Equal Employment Opportunity Commission ("EEOC") underscores the non-discriminatory nature of the challenged arrangement in

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*See pp. 4-5, Pamphlet, "A Choice of Health Plans", describing eligibility under the City's employee health and hospital insurance program (213a).

**Other limitations in coverage include exclusion for sanitorium-type, custodial or convalescent care, rest cures, and X-ray therapy and limitations on coverage for communicable diseases, pulmonary tuberculosis and mental or nervous disorders. Id. at 15, 16.

its Guideline entitled "Fringe Benefits", 29 C.F.R. § 1604.9, which provides:

> It shall be unlawful employment practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives of male employees which are not available for female employees; or to make available benefits to the husbands of female employees which are not available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits. 29 C.F.R. § 1604.9 (d) (emphasis added).

And in the one decision dealing with a claim similar to that Plaintiff-Appellants press here, the Court found squarely that a health and hospitalization program providing reduced maternity benefits was non-discriminatory, since it applied to both employees and dependents:

> Plaintiff's theory is that defendants' group insurance program discriminates on the basis of sex because a reduced benefit is paid in the case of pregnancy when compared with hospitalizations for other causes. There is no doubt that the insurance program makes a distinction in the case of pregnancy as to the extent of benefits available. However, the pregnancy distinction applies to both male and female employee-beneficiaries of the plan. The insurance proceeds are paid on behalf of the employee, male or female, according to a single formula in all pregnancy cases.

> Thus, for a male employee whose wife is pregnant, the insurance benefit is the same as provided to a pregnant female employee such as plaintiff. Satty v. Nashville Gas Co., 384 F.Supp. 765, 766-67 (M.D. Tenn. 1974).

And placing reliance on 29 C.F.R. 1604.9(d), as well as simple logic, the Court concluded:

> So far as the issue relating to the insurance program is concerned, the court finds no distinction in the application, operation, or effect of the insurance plan to support a finding of unlawful discrimination by reason of sex, since all employees, male or female, receive the same benefit. 384 F.Supp. at 767.

That this same result obtains in the case at bar is brought home with striking clarity, for here Plaintiffs-Appellants present a phenomenon unique in sex discrimination litigation -- men and women claiming that one employment policy discriminates against all of them on the basis of sex. Thus, the named Plaintiffs-Appellants, who include in their number a male -- Robert Sussman -- claim to represent a class which

> ...is composed of (a) all female employees of the City ...and (b) males employed by the City ... who ... had a wife or female dependent capable of becoming pregnant or who became pregnant. Complaint ¶ 3 at 3a-4a.

And Plaintiffs-Appellants go on to assert that while the "practices" complained of are directed "uniformly" to all members of the alleged androgynous "class" (Complaint ¶ 3D at 6a), there exists nontheless discrimination on the basis of sex. But the discrimination Plaintiffs-Appellants perceive does not exist

when facts are substituted for abstractions. For the plain fact is that the health and hospitalization insurance applies equally to all employees, male and female, and thus absent is any discrimination because of sex.

III.

CONCLUSION

Since January, 1973, Blue Cross has been responding to the charges of sex discrimination contained in the Complaint herein. First before the New York City Human Rights Commission, which had dropped the matter entirely; next before the EEOC, which has dismissed the charges against Blue Cross; then before Judge Knapp; then before this Court; again before Judge Knapp; and now a second time before this Court. Throughout, Blue Cross has been swept up in the flow of a case in which it clearly does not belong. The time is long overdue for the charges against Blue Cross finally to be disposed of.

For all of the above-stated reasons, an Order should issue which will finally dispose of the ill-founded assertions of discrimination against Blue Cross.

Dated: New York, New York
March 18, 1977.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WOMEN IN CITY GOVERNMENT UNITED, BARBARA ROBERTSON, et al.,

Plaintiffs-Appellants,

v.

THE CITY OF NEW YORK, ABRAHAM BEAME as Mayor of the City of New York, et al.,

Defendants-Appellees

AFFIDAVIT OF SERVICE BY MAIL

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

EDNA G. WATROUS, being duly sworn, says: I am employed in the office of Breed, Abbott & Morgan, 1 Chase Manhattan Plaza, New York, New York 10005, attorneys for defendant-appellee Blue Cross and Blue Shield of Greater New York in the above entitled action.

On May 18, 1977, I served the annexed

BRIEF OF DEFENDANT-APPELLEE, BLUE CROSS AND BLUE SHIELD OF GREATER NEW YORK

by depositing a true copy thereof in a sealed, postpaid envelope at the post office box maintained at 1 Chase Manhattan Plaza, New York, N.Y. 10005, addressed to the following:

Mirkin, Barre, Saltzstein & Gordon, P. C. 98 Cutter Mill Road, Great Neck, N. Y. 11021

Rabinowitz, Boudin & Standard, 30 East 42nd Street, New York, N.Y. 10017

Hartman & Craven, 150 East 58th Street, New York, N.Y. 10022

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Corporation Counsel of the City of New York, Municipal Building, New York, N. Y. 10007

Sworn to before me this
18th day of May 19 77

Donald L. Price

DONALD L. PRICE
NOTARY PUBLIC, State of New York
No. 24-8439300
Qualified in Kings County
Certificate Filed in New York County
Commission Expires March 30, 1978

Edna G. Watrous

Edna G. Watrous